

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

**Illinois Commerce Commission  
On Its Own Motion**

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**04-0165**

**Amendment of 83 Ill. Adm. Code  
759.**

**PROPOSED ORDER**

By the Commission:

**Background**

In Docket No. 01-0590, a rulemaking proceeding was initiated by the Illinois Commerce Commission ("Commission") for purposes of enacting rules necessary to implement Section 13-301.3 of the Public Utilities Act ("Act" or "PUA"), 220 ILCS 5/13-301.3. Section 13-301.3 establishes the "Digital Divide Elimination Infrastructure Program ("DDEIF")."

On March 18, 2003, the Commission entered an Order in Docket 01-0590 adopting Proposed Rules, 83 Ill. Adm. Code 759 ("Part 759"), "Digital Divide Elimination Infrastructure Fund," as reflected in the Appendix attached thereto, with an effective date of April 1, 2003.

At that time, Section 13-301.3(b) of the Act stated:

The Commission shall adopt rules under which it will make grants out of funds appropriated from the Digital Divide Elimination Infrastructure Fund to eligible entities as specified in the rules for the construction of high-speed data transmission facilities in areas of the State for which the incumbent local exchange carrier having the duty to serve such area, and the obligation to provide advanced services to such area pursuant to Section 13-517 of this Act, has sought and obtained an exemption from such obligation based upon a Commission finding that provision of such advanced services to customers in such area is either unduly economically burdensome or will impose a significant adverse economic impact on users of telecommunications services generally.

Section 13-517 of the Act, which is referenced in Section 13-301.3(b), states in part:

(a) Every Incumbent Local Exchange Carrier (telecommunications carrier that offers or provides a noncompetitive telecommunications

service) shall offer or provide advanced telecommunications services to not less than 80% of its customers by January 1, 2005.

(b) The Commission is authorized to grant a full or partial waiver of the requirements of this Section upon verified petition of any Incumbent Local Exchange Carrier ("ILEC") which demonstrates that full compliance with the requirements of this Section would be unduly economically burdensome or technically infeasible or otherwise impractical in exchanges with low population density.

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In Part 759 as currently written, **Subpart A** contains a general statement of purpose, as well as the definitions for the terms used in this rule. Key terms defined include Applicant; Grant; Grant Agreement; Grantee; Program; Project; and Proposal.

In **Subpart B**, "Eligibility," Section 759.210 currently identifies two ways in which eligibility can be demonstrated. The criteria for "eligible uses" of grants are contained in Section 759.220. In general, under that proposal, grants may be used only for the payment of costs incurred in the construction of high-speed data transmission facilities, which must be located in an eligible area.

With regard to "eligible areas," Section 13-301.3(b), as written at the time Part 759 was adopted, provided a threshold eligibility requirement for DDEIF grants. Grants could only be used "in areas of the State for which the incumbent local exchange carrier have the duty to serve such area, and the obligation to provide advanced services to such area pursuant to Section 13-517 of this Act, has sought and obtained an exemption from such obligation..." Section 759.230 currently provides that "an eligible area shall be comprised of one or more waiver areas", and that "grants shall only be used for eligible uses within a waiver area of the State." "Waiver areas" are defined in Section 759.120 of the current rules as "an area of the state for which an [ILEC] ... has applied for and received a waiver from its obligation to offer or provide advanced services to 80% of its customers, pursuant to Section 13-517 of the Act."

**Subpart C** is called "Review of Proposals." It contains four sections which address 1) Proposal Content, 2) Selection of Grant Recipients, 3) Limitations and Obligations, and 4) Reporting Requirements.

### **Proposed Revisions to Part 759**

In the instant rulemaking proceeding, Docket 04-0165, revisions to Part 759 are proposed in order to implement certain amendments to Section 13-301.3 of the Act. A first notice order was entered on February 24, 2004 initiating this proceeding. The proposed rules were published in the Illinois Register on March 12, 2004, initiating the first notice period pursuant to Section 5-40(b) of the Illinois Administrative Procedure Act.

Pursuant to due notice, hearings were held at the offices of the Commission at Springfield, Illinois before a duly authorized administrative law judge, and are concluded. An appearance was entered by counsel for the Commission Staff ("Staff"). Staff filed Initial Comments and on September 23, 2004 filed Supplemental Comments. No other appearances were entered and no other comments were filed.

As noted above, subsequent to the time Part 759 was adopted, certain amendments to Section 13-301.3 of the Act have been enacted. The first such amendments to Section 13-301.3 were made in **Public Act 93-0306** ("P.A. 93-0306"). P.A. 93-0306 amended Section 13-301.3(b) to read as follows:

(b) The Commission shall adopt rules under which it will make grants out of funds appropriated from the Digital Divide Elimination Fund to eligible entities as specified in the rules for the construction of high-speed data transmission facilities in eligible areas of the State. For purposes of determining whether an area is an eligible area, the Commission shall consider, among other things, whether (i) in such area, advanced telecommunications services, as defined in subsection (c) of Section 13-517 of this Act, are under-provided to residential or small business end users, either directly or indirectly through an Internet Service Provider, (ii) such area has a low population density, and (iii) such area has not yet developed a competitive market for advanced services. In addition, if an entity seeking a grant of fund from the Digital Divide Elimination Infrastructure Fund is an incumbent local exchange carrier having the duty to serve such area, and the obligation to provide advanced services to such area pursuant to Section 13-517 of this Act, the entity shall demonstrate that it has sought and obtained an exemption from such obligation pursuant to subsection (b) of Section 13-517. Any entity seeking a grant of funds from the Digital Divide Elimination Infrastructure Fund shall demonstrate to the Commission that the grant shall be used for the construction of high-speed data transmission facilities in an eligible area and demonstrate that it satisfies all other requirements of the Commission's rules. The Commission shall determine the information that it deems necessary to award grants to this Section.

According to Staff, P.A. 93-0306 amended Section 13-301.3 in three ways. First, P.A. 93-0306 expands the scope of areas potentially eligible to receive grants from the Commission. Prior to P.A. 93-0306, only those areas served by incumbent local exchange carriers ("ILECs") that received a waiver from the Commission under Section 13-517 were eligible to receive grants.

Second, pursuant to P.A. 93-0306, ILECs are only eligible to receive grants from the Commission if they have obtained a waiver from the Commission under Section 13-517 of the PUA. Previously, Staff states, Section 13-301.3 imposed no such precondition on ILECs before becoming eligible to receive a grant. Third, P.A. 93-0306

sets forth specific criteria the Commission must consider when evaluating whether a particular area is eligible to receive a grant.

With respect to the proposed **amendments to Part 759**, Staff recommends that three sections of Part 759 be amended to ensure consistency between the Commission's rules and the statute as amended by P.A. 93-0306. In Section 759.120, "Definitions", Staff recommends that the term and definition for "Waiver Area" be deleted, because that term is no longer used in the statute to designate the areas where eligible entities may spend grant moneys awarded by the Commission. (Staff Initial Comments at 4-5)

Subpart B of Part 759 is titled "Eligibility". Under Staff's recommendations, in **Section 759.230, "Eligible Areas"**, the rule would continue to provide that grants may only be used for eligible uses, as described in Section 759.220, within "eligible areas". Staff proposes that Section 759.230 be amended to provide that for purposes of determining whether an area is an "eligible area", the Commission shall consider, among other things, the statutory criteria set forth in P.A. 93-0306.

Accordingly, new subsection 759.230 a)1) provides that the Commission must consider, in deciding whether to classify an area as an "Eligible Area" within the meaning of Section 13-301.3, whether the area to be served by advanced telecommunications services, as defined in Section 13-517(c) of the Act, is underprovided to residential or small business end users, either directly or indirectly through an Internet Service Provider.

New subsection a)2) provides that the Commission must consider, when deciding whether to classify an area as an "Eligible Area" within the meaning of Section 13-301.3, whether the area under scrutiny has a low population density.

New subsection a)3) to Section 759.230 provides that the Commission must consider, when deciding whether to classify an area as an "Eligible Area" within the meaning of Section 13-301.3, whether the area under scrutiny has not yet developed a competitive market for advanced telecommunications services.

New subsection 759.230 b) provides in part that the service territory of an incumbent local exchange carrier can only potentially qualify as an "Eligible Area", if the carrier has received an exemption under Section 13-517 of the PUA.

**Subpart C** of Part 759 is called "Review of Proposals". In Section 759.310, "Proposal Content", Staff recommends that subsection b)6) of Section 759.310 be amended to add the phrase "and a description of the area as it relates to the Eligible Area criteria (see Section 759.230)". The suggested change is intended to clarify that subsection and provide an appropriate cross-reference to the revised definition of "Eligible Areas."

In Section 759.320, "Selection of Grant Recipients", Staff recommends that subsection c) be added to require that the Commission consider the location of a particular proposed project when evaluating a grant application. Staff says this information is necessary to the determination of whether the area is an "eligible area" within the meaning of the new statutory criteria noted above, and to award grants pursuant to Section 13-301.3.

In its **Supplemental Comments** filed September 23, 2004, Staff recommends an additional change to Part 759 to make the rule consistent with a further amendment to Section 13-301.1 that was signed into law on July 22, 2004. Public Act 93-0797 ("P.A. 93-797"), also known as the Accessible Electronic Information Act, creates an "Accessible Electronic Information Service Fund." (P.A. 93-797, Section 90, codified as 30 ILCS 105/5.625) In addition, P.A. 93-797 amends Section 13-301.1(a) of the Illinois Public Utilities Act to provide that the Digital Divide Elimination Infrastructure Fund "shall be used ... by the Commission to fund ... the accessible electronic information program, as provided in ... the Accessible Electronic Information Act." (P.A. 93-797, Section 95, amending 220 ILCS 5/13-301.1(d))

According to Staff, since this fund is to be used for purposes other than those currently specified in Part 759, further amendments are required to Part 759 to conform it to the amendments described above. Toward that end, Staff recommends that Section 759.110, titled "Purpose", be modified. Currently, Section 759.110 reads as follows:

Section 13-301.3 of the Public Utilities Act [220 ILCS 5/13-301.3] created the Digital Divide Elimination Infrastructure Fund (Fund) as a special fund in the State treasury to be used by the Illinois Commerce Commission (Commission) for grants to fund the construction of high-speed data transmission facilities in the State. This Part specifies the procedures that shall be followed with respect to the awarding of these grants.

Staff proposes that 759.110 be amended to add the phrase "and the provision of accessible electronic information service to blind and disabled throughout Illinois as provided in the Accessible Electronic Information Service Fund."

### **Conclusions, Findings and Ordering Paragraphs**

As explained above, in light of recent amendments to Section 13-301.1 of the Act, revisions are being made to Part 759 in order to make the rule consistent with the currently effective provisions of Section 13-301.1.

Having reviewed the record, the Commission finds that the revisions to Part 759 as proposed in Staff's comments are appropriate for that purpose and, except for minor changes consisting primarily of stylistic changes recommended by the Staff of the Joint Committee on Administrative Rules, should be incorporated into the proposed revisions to be submitted to the Joint Committee on Administrative Rules.

The Commission also finds that for purposes of clarification, one additional change in Part 759 would be appropriate for inclusion in the proposed rule revisions. As noted above, the amendments to Section 13-301.1 that are contained in P.A. 93-0306 require the Commission to consider a number of substantive criteria, particularly in determining whether an area is an “eligible area”.

Under Staff’s proposal, new subsections would be included in Section 759.230 of Subpart B, “Eligibility”, requiring Commission consideration of those criteria in determining whether an area is an eligible area. In Staff’s proposal, these criteria have also triggered proposed changes in Sections 759.310 b)6) and 759.320 of Subpart C, “Review of Proposals”.

This determination of “eligible area” is significant, because proposed subsection a) of Section 759.230 specifically provides that “grants shall only be used for eligible uses ... within an eligible area.” Furthermore, this determination must be made by means of action at the Commission level.

In view of the substantive nature of the criteria that must be considered under Section 759.230, and the significance thereof, the Commission believes the rule should be clarified to provide a procedural mechanism for evaluating those criteria. Accordingly, in Subpart C, in the first line of Section 759.310 b), the words “shall be docketed and” should be added after the words “grant proposal”. With this modification, the first line would read, “Proposal items: The grant proposal shall be docketed and shall include, at a minimum, the following sections:”

The Commission, having considered the entire record, is of the opinion and finds that:

- (1) the Commission has jurisdiction over the parties and subject matter herein;
- (2) the recitals of fact set forth in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;
- (3) the proposed amendments to 83 Ill. Adm. Code 759, as reflected in the attached Appendix, should be submitted to the Joint Committee on Administrative Rules to begin the second notice period.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proposed amendments to 83 Ill. Adm. Code 759, as reflected in the attached Appendix, shall be submitted to the Joint Committee on Administrative Rules, pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act.

IT IS FURTHER ORDERED that this order is not final and is not subject to the Administrative Review Law.

By proposed order this 27th day of October, 2004.

Administrative Law Judge